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conservation law foundation

For a thriving New England

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Via Electronic Mail (tedder.newton@epa.gov)gg
Mr. Newton Tedder
U.S. EPA, Region I
5 Post Office Square
Suite 100, Mail Code OEP 06-4
Boston, MA 02109-3912

Re: 2013 New Hampshire Small MS4 Draft General Permit

Dear Mr. Tedder:

Conservation Law Foundation (CLF) appreciates the opportunity to comment on proposed modifications to the above-referenced draft general permit, pertaining to small municipal separate storm sewer systems (MS4s) in New Hampshire, as publicly noticed in the Federal Register on September 1, 2015. CLF is a member-supported environmental advocacy organization that works to solve the problems threatening our natural resources and communities in New Hampshire and throughout New England. CLF has worked, and continues to work, to protect the health of our waterways and, in doing so, to promote effective regulations and strategies to reduce and minimize the significant impacts of stormwater pollution. CLF submitted comments on prior iterations of this draft permit by letters dated February 20, 2009, July 27, 2010, and August 12, 2013. CLF incorporates its prior comments, including all attachments submitted therewith, as if fully set forth herein. With respect to the proposed modifications, CLF provides the following comments.

1. Compliance Schedules

In its Statement of Basis for Proposed Modifications ("Statement of Basis"), the Environmental Protection Agency ("EPA") references new regulations in New Hampshire relative to compliance schedules in National Pollutant Discharge Elimination System ("NPDES") permits, stating:

> When EPA drafted the 2013 draft New Hampshire small MS4 permit, New Hampshire regulations did not allow for the use of compliance schedules in NPDES permits. On November 22, 2014, Env-Wq 1701.03 "Compliance Schedules in NPDES Permits" was adopted into rule and became effective, allowing compliance schedules to be put into NPDES permits. Accordingly, EPA has amended the language in Sections 2.1.1 and 2.2 and Appendix F and added specified schedules leading to compliance with water quality standards which are consistent with Env-Wq 1701.03 and 40 CFR §122.47.

See Statement of Basis at 2.

The above-referenced regulations pertaining to compliance schedules only apply in limited circumstances. Specifically, Env-Wq 1701.03 provides that a NPDES permit issued or renewed for a discharge to New Hampshire surface waters "shall not specify a schedule leading to compliance with New Hampshire or federal surface water quality standards, or both, *unless* . . . [t]he compliance schedule is provided to afford the permittee adequate time to comply with one or more permit requirements or limitations *that are based on new, newly interpreted, or revised water quality standards that became effective after issuance of the original discharge permit and after July 1, 1977*." *See* Env-Wq 1701.03(a) (emphasis added). EPA has not identified what, if any, "new, newly interpreted, or revised water quality standard" is being relied upon as the basis for EPA's proposed modifications. CLF does not concede that the limited conditions in which compliance schedules are allowable under Env-Wq 1701.03 have been satisfied. To the extent one or more "new, newly interpreted, or revised water quality standard" exists to lawfully allow the use of compliance schedules, such schedules must be related directly to such water quality standard and not to the permit generally.

To be clear, and as stated in prior comments, CLF supports the more prescriptive nature of the draft permit, as compared to the Small MS4 permit it will replace. Accordingly, CLF supports clear deadlines by which permittees must complete specified actions. However, the Statement of Basis does not provide sufficient information to determine whether, pursuant to Env-Wq 1701.03, EPA can lawfully determine that permittees are *in compliance* with the permit, even when discharges are causing or contributing to the violation of water quality standards, simply by virtue of proceeding with actions on certain specified timelines. Accordingly, CLF objects to any and all amendments that would have such an effect. *See, e.g.,* EPA's proposal to strike §2.2.1(h).

To the extent there is a lawful basis for a compliance schedule pursuant to New Hampshire's recently adopted regulation, Env-Wq 1701.03 provides that "[a] compliance schedule established to meet any surface water quality standard that applies to New Hampshire waters receiving the discharge shall . . . [r]equire compliance at the earliest practicable time." *See* Env-Wq 1701.03(b). Various deadlines enumerated included in the proposed modifications are not consistent with this requirement and must be accelerated; and under no circumstances should deadlines extend beyond the five-year term of the permit.[1]

2. Discharges to Certain Impaired Waters

EPA proposes to modify the draft permit by striking the following language: "EPA or the State agency may determine that additional waters shall be treated as 'impaired' waters pursuant to this Part based on water quality or modeling information and shall notify the affected MS4 operators of any such determination." *See* Proposed Modifications to Draft Permit §2.2. In light

[1] The proposed modifications include a requirement that implementation of Lake Phosphorus Control Plans be completed "as soon as possible but no later than 15 years after the effective date of the permit." *See* Appendix F at 16. CLF strongly objects to this fifteen-year timeframe and urges that the deadline for this requirement, and related milestones, be greatly accelerated.

of the five-year term of the draft permit, it is essential to provide flexibility to ensure that waters not designated as impaired at the time of the permit's issuance, but that are demonstrated to be impaired at some future time during the permit term, are provided necessary protections. While it appears EPA may intend such protections on a pollutant-specific basis,[2] CLF objects to striking this overarching language.

3. Discharges Subject to Requirements Related to an Approved TMDL

CLF objects to the draft permit's limitation of §2.2.1 to TMDLs that are in existence "as of the effective date of this permit," as the permit should provide special provisions for impaired waters that are subject to TMDLs that are approved by EPA *during* the term of the permit. CLF also objects to EPA's proposal to strike the following language as set forth in §2.2.1(b): "In addition to those specific requirements, EPA may notify the small MS4 of the need to comply with additional requirements that are consistent with the assumptions and requirements of the Waste Load Allocation (WLA)." It is essential that EPA have greater flexibility and discretion to ensure necessary actions to achieve needed load reductions. CLF urges that this language be restored in finalizing the permit.

4. Discharges to Certain Water Quality Limited Waters Without TMDLs

CLF appreciates the more detailed and prescriptive approach of the draft permit, as compared to the prior Small MS4 permit, to addressing Small MS4 discharges to impaired waters that do not yet have approved TMDLs. We are greatly concerned, however, with the proposal to strike prior language pertaining to the development of Water Quality Response Plans ("WQRPs"). While presumably EPA intends to rely upon the various pollutant-specific requirements set forth in its new, proposed Appendix H, we believe the permit will be weakened with the elimination of prior WQRP language (*i.e.,* language contained in §2.2.2.a.ii. of the prior iteration), including the elimination of a one-year timeframe for developing a WQRP, and the requirement that Stormwater Management Plans contain separate sections specifically addressing the matters to be addressed in WQRPs.

CLF is greatly concerned with the timeframes contemplated in the proposed modifications, as set forth in proposed changes to §2.2.2 and Appendix H. In the first instance, it is important to note that while the prior iteration of the draft permit contemplated an iterative approach to addressing impairment-related discharges from Small MS4s, it provided for the development of WQRPs within one year of the effective date of the permit, and an iterative approach that would take place over the course of the permit term. *See, e.g.*, prior language in §2.2.2 describing a three-phase iterative approach to take place "over the course of the permit term," which EPA now proposes to strike. For the reasons discussed above (*see* Item 1), and because it is essential to make more expedited progress in reducing pollution and resolving impairments, we object to an iterative approach that is not temporally bounded by the permit's five-year term. For the same reasons, we also urge EPA to adopt schedules in Appendix H – such as for nitrogen and phosphorus Source Identification Reports, and for structural BMPs – that are more accelerated

[2] *See, e.g.,* §§2.2.2(a)(i)(2) (relative to nitrogen), (b)(i)(2) (phosphorus), (c)(i)(2) (bacteria and pathogens), and (d)(1)(2) (chlorides). Note that in §2.2.2(e)(i)(2), the proposed modification omits the words "solids, oil and grease (hydrocarbons) or metals." These words should be added following the clause "that is water quality limited due to".

than currently proposed. We reiterate our position, discussed in Item 1, above, that such schedules cannot be considered *compliance* schedules.

5. Stormwater Management in New Development and Redevelopment

The proposed modifications include the requirement that "[p]ermittees shall develop, implement, and enforce a program to address post-construction stormwater runoff from all new development and re-development projects that disturb a minimum of one or more acres and discharge into the permittees [*sic.*] MS4 at a minimum." *See* §2.3.6(a), as proposed for modification. CLF strongly supports such a program (with modifications to be consistent with our comments below). However, we strongly urge adoption of a lesser acreage threshold. Specifically, and particularly in light of past development trends in southern and southeastern New Hampshire, and the potential for those trends to occur again (particularly in the Seacoast region), the permit should adopt a threshold no greater than one-half acre.

As set forth in our prior comments, low impact development (LID)/green infrastructure has become the most effective way to reduce the stormwater impacts of development (both new and existing). In addition to LID/green infrastructure-related materials submitted by CLF in its prior comments, continuous monitoring and adaptive control technologies can and must play a critical role in reducing stormwater and associated pollutants for both new development and redevelopment, and enhancing the effectiveness of best management practices.[3] In addition to their significant water quality benefits, LID/green infrastructure and continuous monitoring/adaptive control approaches can and must serve as essential tools in making communities more climate resilient, helping reduce flooding from storm surges and severe rain and snow events.[4] These technologies are entirely practicable and reduce stormwater pollution to the maximum extent. Accordingly, as CLF has made clear in its prior comments, the permit should *require* their adoption and implementation as part of its governing "maximum extent practicable," or "MEP," standard.

In light of the foregoing, CLF is heartened to see language in the proposed modification requiring permittees to develop ordinances or other regulatory mechanisms "that are at least as stringent as the following: (a). Low Impact Development (LID) site planning and design strategies must be used to the maximum feasible in order to reduce the discharge of stormwater from new development." *See* §2.3.6.a.ii.(a) of proposed modifications. CLF strongly supports this language and urges – for the reasons set forth in our prior comments – the adoption of other

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[3] *See* Marcus Quigley, P.E., D.WRE and Lefkowitz, Jamie, P.E., *Overview of Continuous Monitoring and Adaptive Control for Enhancing or Converting Approved Stormwater BMP Types in the Chesapeake Bay Watershed*; Marcus Quigley, D.WRE, P.E and Lefkowitz, P.E., "Presentation to the Chesapeake Bay Program Urban Stormwater Work Group (Oct. 20, 2015). Both documents are provided herewith.

[4] EPA itself has released several documents highlighting the stormwater reduction and economic benefits from LID/GI. *See, e.g.,* Enhancing Sustainable Communities With Green Infrastructure: A guide to help communities better manage stormwater while achieving other environmental, public health, social, and economic benefits (2014) http://www.epa.gov/smartgrowth/pdf/gi-guidebook/gi-guidebook.pdf; Getting to the Green: Paying for Green Infrastructure -- Financing Options and Resources for Local Decision Makers (2014) http://www2.epa.gov/sites/production/files/2015-02/documents/gi_financing_options_12-2014_4.pdf; Case Studies Analyzing the Economic Benefits of Low Impact Development and Green Infrastructure Programs (2013) http://water.epa.gov/polwaste/green/upload/lid-gi-programs_report_8-6-13_combined.pdf.

provisions ensuring that LID/green infrastructure, as well as continuous monitoring and adaptive control technologies, are required and actually implemented in furtherance of meeting the MEP standard, as well as for ensuring that discharges do not cause or contribute to water quality violations.

While CLF strongly supports the above-quoted language (*i.e.*, §2.3.6.a.ii.(a) of the proposed modifications), we are greatly concerned that §2.3.6.d of the proposed modification is inconsistent with, and undermines, the mandatory nature of LID/green infrastructure as set forth in §2.3.6.a.ii.(a). Specifically, §2.3.6.d merely requires permittees to assess whether local regulations and codes *allow* LID/green infrastructure, and to take steps, if necessary, to make such practices *allowable*. These provisions should be changed to require an assessment of local ordinances and codes, and necessary changes to such ordinances and codes, to *require* (not simply *allow*) LID/green infrastructure. Similarly, §2.3.6.c, as set forth in the proposed modifications, should be amended to *require* permittees to change street design and parking lot guidelines, and other local requirements related to the development of impervious surfaces, to adopt low impact design options. The time for communities to achieve these actions (relative to LID in local regulations and ordinances, and relative to impervious surfaces) should be shortened from three years to a maximum of two.

EPA's proposed modifications include striking language related to tracking impervious area (IA) directly connected impervious area (DCIA), namely §2.3.6.8.a of the prior iteration of the draft permit. CLF strongly supports requirements that permittees track impervious area and DCIA, and assess possible locations for LID retrofits, as tracking overall impervious cover and DCIA will allow communities to fully account for the causes of waterway impairment, and is an important step towards the deployment of LID/green infrastructure on a broader scale. Accordingly, CLF objects to the proposed striking of this language and urges that it be restored. For the same reasons, CLF also objects to the proposed striking of language in §2.3.6.8.c of the prior iteration of the draft permit.

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CLF appreciates the effort EPA has invested in advancing this permit. In light of the many years of process, it is CLF's hope that EPA will, following the conclusion of the process noticed in the Federal Register, promptly proceed to a final permit without delay, and with changes that address concerns identified by CLF. Again, we appreciate the opportunity to provide these comments.

Respectfully submitted,

Thomas F. Irwin
Vice President & CLF New Hampshire Director